WINSIN ENTERPRISE SDN BHD

v.

OXFORD TALENT (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D5(D6)-22-734-2008]
30 APRIL 2009

ARBITRATION: *Stay of proceedings - Mandatory stay - Principles applicable - Right to apply - Step taken in proceedings - Defendant requested and obtained extension of time to file defence - Whether defendant had taken a step in the proceedings - Whether defendant deprived of right to invoke s. 10(1) for mandatory stay under Arbitration Act 2005*

The defendant was the plaintiff's main contractor in respect of a project pursuant to a contract signed by both parties based on the Standard PAM Conditions of Contract. The plaintiff commenced this suit against the defendant for the return of a sum of money mistakenly overpaid to the defendant under some relevant architect's interim certificates. The defendant filed an unconditional appearance and later requested the plaintiff for an extension of time to file the defence that was subsequently granted. However, instead of filing the defence on the agreed date, the defendant applied for stay of proceedings pursuant to s. 10(1) of the Arbitration Act 2005 ('2005 Act') to refer the matter to arbitration based on cl. 34 of the contract. The plaintiff opposed the application and submitted that the current proceedings were not in respect of a matter that was subject to arbitration, the reason being, a claim for repayment of moneys paid either mistakenly or erroneously in excess thereof fell outside the scope of cl. 34 of the contract. Also, that the claim did not relate to works under the contract. The defendant, on the other hand, submitted that the claim for repayment was challenged primarily on grounds of inaccuracy of calculation and that it was related to works under the contract.

Held (dismissing defendant's application for stay):

(1) The old Arbitration Act 1952 ('1952 Act') was repealed by s. 51(1) of the new 2005 Act. Under s. 6 of the 1952 Act the court had a general discretion whether or not to grant a stay of court proceedings where there was an arbitration agreement.

A Under s. 10(1) of the 2005 Act, stay was mandatory subject to the situations set out in s. 10(1)(a) and (b). However, one condition remained a requisite under the old and new Acts, *ie*, that an applicant must not have taken any other steps in the proceedings. (para 8)

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(2) From a reading of s. 10(1) of the 2005 Act, it must first be determined whether the current proceedings were in respect of a matter that was the subject of an arbitration agreement. If the answer was in the affirmative and the applicant had not taken C any other step in the proceedings, it was mandatory for the court to refer the parties to arbitration simply for the reason that they conform with party autonomy and the fact that they had mutually contracted to resolve disputes or differences by way of arbitration. Such choice as set out in the written D contract must be respected. (para 9)

(3) From the language used in cl. 34 of the contract, the parties clearly intended that the scope or type of matters that shall be compulsorily referred to arbitration was very wide. That should include a dispute concerning overpayment in the manner E described in the statement of claim. Therefore, the first condition in s. 10(1) was satisfied. (para 11)

(4) A defence was only filed where a party intended to defend an action. Order 18 r. 2(1) of the Rules of the High Court 1980 F provided that where a defendant intended to defend the action instituted, the next step, after an entry of a memorandum of appearance, was to serve a defence on the plaintiff within the prescribed period unless leave was granted to the contrary. In the present case, it was clear that the defendant sought and was G granted an extension of time by the plaintiff to serve and file the defence. Having evinced such an intention to the plaintiff, s. 10(1) under the 2005 Act was no longer available to the defendant. That would be the position whether under the new or old law. Further, as stay was now mandatory because of the H language deployed in s. 10(1) subject to the relevant reservations, applicants who sought to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance. (paras 15, 16 & 17)

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(5) The current proceedings were brought in respect of a matter that was the subject of an arbitration agreement. As such, stay would have been mandatory. However, as the defendant had taken a step in the proceedings by requesting and obtaining an extension of time to file the defence, the defendant was deprived of its right to invoke s. 10(1) of Act 2005. (para 18)

Case(s) referred to:
Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***
Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 6
Arbitration Act 2005, ss. 10(1), 51(1)
Rules of the High Court 1980, O. 3 r. 5(3), O. 18 r. 2(1)

For the plaintiff - CM Wong; M/s Arthur Wang Lian & Assoc
For the defendant - TJ Chin; M/s TJ Chin & Co

Reported by Usha Thiagarajah

JUDGMENT

Mary Lim JC:

[1] The defendant was the main contractor to the plaintiff in a project relating to "Cadangan Meroboh Bangunan 2 Tingkat Sedia ada dan Membina Semula Bangunan 6 Tingkat yang mengandungi kedai di tingkat bawah, Pejabat di tingkat mezzanine, dan hotel budget di tingkat 1, 2, 3 dan 4 di atas lot 28 & 29, 1 & 3 Jalan Petaling, Seksyen 21, Kuala Lumpur" (said project). The contract signed between the parties was based on Standard PAM Conditions of Contract.

[2] The plaintiff's claim is for the return of a sum of RM445,372.74 being monies purportedly overpaid or paid mistakenly or in error to the defendant. This sum was paid under Interim Certificates No. 12 to 15. At that time the sum involved was RM564,204.02. Upon realizing its mistake the plaintiff deducted the sum of RM118,831.28 payable under Interim Certificates No. 16 and 17 leaving the current sum outstanding and as claimed. Despite several attempts, the plaintiff was unsuccessful in reclaiming the sum. This action was then filed.

[3] The defendant filed an Unconditional Appearance. Although the memorandum of appearance and the cover letter from the defendant's solicitors' letter serving the memorandum were dated 27 June 2008, both documents were only received by the plaintiff on 2 July 2008 (encl. 6 – exh. "WKS15"). The court records show that the memorandum was in fact only entered on 1 July 2008.

[4] On 8 July 2008, *vide* telephone conversation the defendant's solicitors requested an extension of time to file defence from the plaintiff's solicitors. A letter dated 9 July 2008 ensued to confirm that telephone conversation (encl. 6 – exh. "WKS16"). In that letter it confirms that the plaintiff "… have kindly grant us an extension of time to 21 July 2008 to file the statement of defence".

[5] However, instead of filing the defence on 21 July 2008, the defendant filed on that same date a summons-in-chambers requesting the court to stay all proceedings in the instant case pursuant to s. 10(1) Arbitration Act 2005 (Act 646) (encl. 6). Relying on cl. 34 of the contract between the parties the defendant wants the matter referred to arbitration.

[6] The application is opposed by the plaintiff on several grounds. In view of the new s. 10(1) in Act 646, the relevant issues relate to whether the current proceedings are brought in respect of a matter which is the subject of an arbitration agreement; and whether by requesting and obtaining an extension of time to file defence, the defendant has taken "any other steps in the proceedings" within the meaning of s. 10(1) of Act 646 such as to bar this application.

[7] In order to determine this issue it is useful to set out both cl. 34 of the contract and s. 10(1) of Act 646. Clause 34 reads as follows:

> **34.0 Arbitration**
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> 34.1 In the event that any dispute or difference arises between the Employer, or the Architect on his behalf, and the Contractor, either during the progress or after completion or abandonment of the Works regarding:
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> 34.1 (i) any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the Architect; or

34.1 (ii) the withholding by the Architect …

34.1 (iii) …

34.1(iv) …

34.1(v) …

then such disputes or differences shall be referred to arbitration.

Section 10(1) of Act 646 provides that:

10(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:

(a) that the agreement is null and void, inoperative or incapable of being performed; or

(b) that there is in fact no dispute between the parties with regard to the matters to be referred.

[8] The position under the old law relating to arbitration is insightful for determining the issues at hand. The Arbitration Act 1952 was repealed by virtue of s. 51(1) of Act 646. Under s. 6 Arbitration Act 1952 the court had general discretion whether or not to grant a stay of court proceedings where there is an arbitration agreement. If certain conditions were met the court may exercise discretion in the defendant's favour. One such condition was the readiness and willingness on the part of the defendant to arbitrate. That is no longer necessary. However, one condition remains a requisite then and now. And it is the requirement that an applicant must not have taken other steps in the proceedings. Apart from that, the critical difference between s. 6 and the new s. 10(1) is that stay is now mandatory save for the two situations set out in s. 10(1)(a) and (b).

[9] From a reading of s. 10(1) it also appears that it must first be determined whether the current proceedings are in respect of a matter which is the subject of an arbitration agreement. If the answer is in the affirmative and the applicant has not taken any other steps in the proceedings the court is mandatorily required to refer the parties to arbitration. The reasoning is rather simple – this is in conformity with party autonomy and the fact that the parties

A including the ones before the court today had mutually contracted to resolve any dispute or difference that may arise between them by way of arbitration. Such choice as set out in the written contract must be respected.

B **[10]** On the facts, the plaintiff's submission is that the current proceedings are not in respect of a matter which is the subject of an arbitration agreement. According to learned counsel a claim for repayment of monies paid either mistakenly or erroneously in excess falls outside the scope of cl. 34 of the contract. This claim also C does not relate to the works under the contract. Learned counsel for the defendant on the other hand submitted that the claim for repayment is challenged primarily on grounds of accuracies of calculation. It is related to the works under the contract.

D **[11]** Having considered the language in cl. 34 of the contract it is clear that the parties intended that the scope or type of matters that shall be compulsorily referred to arbitration is very wide. Clause 34(1)(i) provides that "In the event that any dispute or difference arises between the employer … and the contractor, either during the E progress or after completion or abandonment of the Works regarding any matter or thing of whatsoever nature arising thereunder … then such disputes or differences shall be referred to arbitration". This includes a dispute concerning overpayment in the manner described in the statement of claim. Therefore the first condition in s. 10(1) is satisfied.

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[12] In relation to the next objection regarding the taking of any other step, the question concerns the request of an extension of time to file defence by the defendant. Does such an act constitute the taking of a step in the proceedings such that the defendant is G considered to have waived his right to arbitration?

[13] For a while the case law in this area concerned the issue of whether the entry of an Unconditional Appearance constituted a taking of other steps in the proceedings so as to deprive an H applicant the right to invoke s. 6 Arbitration Act 1952. Although there was a similar ruling in an earlier Federal Court decision in *Sime AXA Assurance Bhd v. Interscope Versicherung Sdn Bhd* (Federal Court Civil Appeal No. 02-08-2000 (W)) on 18 September 1999 there was no written judgment until the decision in *Sanwell Corp v.* I *Trans Resources Corp Sdn Bhd & Anor* [2002] 3 CLJ 213. In this case

the Federal Court ruled that the "entry of appearance is the mandatory procedural step to be taken by an applicant in proceedings in the High Court. It is a step as required by the RHC. However, it is a permitted, excluded or an exempted step in the proceedings that does not amount to a step in the proceedings within the meaning of s. 6 of the Act which would prejudice the applicant's right to apply for a stay of the proceedings."

[14] In *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* [2002] 3 CLJ 213 the Federal Court made an important observation of the facts in *Usahabina v. Anuar Yahya* [1998] 2 CLJ Supp 131 which is of much guidance in this case. At p. 221 the Federal Court said:

> … At this juncture, we note the existence of one salient fact in *Usahabina* which was mentioned in passing by the learned JC, but unfortunately not properly appreciated by him. It is this fact. In that case, the defendant who had entered an unconditional appearance failed to file his defence within the time limited for doing so. He had requested for, and the plaintiff had agreed to, an extension of one week to file the defence. Pausing here for a moment, what the defendant did was clearly a step in the proceedings within the meaning of s. 6 of the Act by requesting an extension of time to file the defence, clearly indicating an intention to deliver a statement of defence, thus abandoning the right to arbitration (see *Ford's Hotel Co v. Bartlett* [1896] AC 1]…
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> …
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> … the learned JC erred in failing to take into account that the defendant had gone a step further than an entry of an unconditional appearance in that, as hereinbefore mentioned, he had requested an extension of time to file his statement of defence. The defendant's belated attempt to resort to arbitration was an afterthought after judgment in default had been entered against him …
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> In this context, Usahabina was a case of a defendant taking more than one step in the proceedings, ie one step in filing the conditional appearance and another step by applying for the extension of time, clearly indicating an intention to go on with the proceedings instead of asserting his right to arbitration. Even if the first step was not a step in the proceedings as envisaged by s. 6 of the Act, the second step certainly was.

[15] From the facts in this case it is clear that the defendant has abandoned its right to arbitration by requesting for time to file defence. A defence is only filed where a party intends to defend an action such as is the case here. This can be seen from O. 18 r. 2(1) Rules of the High Court 1980 (RHC 1980). That order provides that where a defendant intends to defend the action instituted, the next step after an entry of a memorandum of appearance is to serve a defence on the plaintiff within the prescribed period unless granted leave to the contrary by the court:

> 2(1) Subject to paragraph (2), a defendant who enters an appearance in, and intends to defend, an action must, unless the Court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim is served on him, whichever is the later.

[16] The time period prescribed under O. 18 r. 2 may on application be extended by the court. Alternatively, it may be extended by consent of the parties involved. This is provided under O. 3 r. 5(3) RHC 1980:

> 5. (1) …
>
> (2) …
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> (3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

[17] From the evidence it is clear that the defendant sought and was granted by the plaintiff an extension of time to 21 July 2008 to serve and file the defence. Having evinced such an intention to the plaintiff s. 10(1) is no longer available to the defendant. This would be the position whether under the new or old law. In fact I am inclined to go further to say that because of the language deployed in s. 10(1) where stay is now mandatory, subject to the reservations as earlier discussed, applicants who seek to rely on an arbitration agreement must make the application for stay promptly, even before the filing of an appearance.

[18] In conclusion the current proceedings are brought in respect of a matter which is the subject of an arbitration agreement. In such an instance the grant of a stay will be mandatory. However, because the defendant applicant has taken other steps in the proceedings, namely by requesting and obtaining an extension of time to file defence, the defendant is deprived of the right to invoke s. 10(1) Arbitration Act 2005 (Act 646). Enclosure 5 is therefore dismissed with costs.